THE SUPREME COURT OF THE STATE OF ALASKA

JOHN WIRTZ,	)	
	)	Supreme Court No. S-12980
Appellant,	)	
	)	Superior Court No. 3AN-93-6991 CI
v.	)	
	)	MEMORANDUM OPINION
MONICA S.M. WIRTZ,	)	AND JUDGMENT*
	)	
Appellee.	)	No. 1360 – March 24, 2010
	)	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Craig F. Stowers, Judge.

Appearances: Kathleen A. Weeks, Law Offices of Kathleen A. Weeks, Anchorage, for Appellant. Robert C. Erwin, Palmier - Erwin, LLC, Anchorage, for Appellee.

Before: Fabe, Chief Justice, Eastaugh, Carpeneti, and Winfree, Justices. [Matthews, Justice, not participating.]

I. INTRODUCTION

Thirteen years after the dissolution of John and Monica Wirtz's marriage, John moved to modify the terms of the dissolution agreement to end or reduce payments Monica had been receiving since the dissolution. Per their dissolution agreement, the decree, and an enabling order, Monica was receiving 100% of John's military pension

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* Entered pursuant to Alaska Appellate Rule 214.

payments. John's motion argued in part that significant improvements in Monica's financial circumstances justified modification. The superior court denied John's motion and granted in part Monica's cross-motion to recover thirteen years of unpaid alimony. Because there was no genuine, material factual dispute that the award of the marital portion of the pension was really part of the property division, that part of the award was unmodifiable. But because there were genuine, material factual disputes about whether the remainder of the payments were alimony and, if so, integral to the property division, it was error to resolve the remaining issues without an evidentiary hearing. We therefore affirm in part and vacate in part the denial of the motion to modify, vacate Monica's judgment on her claim for unpaid alimony, and remand for further proceedings.

II. FACTS AND PROCEEDINGS

This appeal raises substantial disputes about the terms and effect of the parties' 1993 dissolution agreement. We must therefore describe in considerable detail what the parties agreed to, the circumstances of the dissolution, the orders the court entered in 1994, and the course of performance.

A. The Dissolution Agreement

Monica and John Wirtz married in April 1984. They had no children together. In July 1993 they filed a dissolution petition containing their dissolution agreement. Monica's attorney drew up the paperwork. The petition indicated that both spouses had received advice from "legal counsel" about a divorce or dissolution, although only Monica was represented during the dissolution proceedings.

When they filed their petition John was employed in Korea, earning an annual gross income of $41,758.80. He had recently retired from what he estimated to be a twenty-four-year-long military career and was reportedly receiving monthly

retirement benefits of approximately $1,800. Monica was then earning an annual gross income of $19,032.74.

The dissolution agreement contains three elements of particular relevance.

First, Sections II.E and F of the agreement describe and allocate the parties' "Assets" and "Debts." The couple jointly owned an Anchorage house that was valued at $119,685 and that was subject to a mortgage debt of $104,365.16. Their other joint personal property was valued at $25,000. John and Monica agreed that the house and all of the personal property would be awarded to Monica. She agreed to assume the house mortgage debt. John agreed to be responsible for the remainder of their joint and separate debts, which totaled $45,500. John therefore was to receive no share of the jointly owned assets.

Section II.E.3 addresses "Retirement Benefits." Section II.E classifies any such benefits as "Assets." Section II.E.3 states that the parties' agreement for distributing "retirement or military pension benefits is attached." John's military retirement was the only such benefit.

Second, the agreement referred to in Section II.E.3 is Addendum No. 1. It contains John's agreement to execute "all documents necessary to allow payment of all allowable retirement pay from his military retirement fund to Monica," and to take action and execute all documents necessary "to permanently assign John's disposable military retirement pay to Monica."[1] (Emphasis added.)

Third, the agreement contains Section III, entitled "SPOUSAL MAINTENANCE (ALIMONY)." It states "$800.00 per month to be paid by [John] . . .

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[1] Under the Uniformed Services Former Spouses' Protection Act "disposable retired pay" is the total monthly retired pay to which a military member is entitled less authorized deductions. 10 U.S.C. § 1408(a)(4) (2006).

beginning when [John] gets a job in Korea but in no event after November 1, 1993, until the recipient dies or remarries."

B. The Dissolution Proceedings

The divorce master conducted a dissolution hearing in October 1993; Monica and her attorney attended but John could not attend, even telephonically. Her attorney told the court there was a "complication" regarding John's military pension. Under federal law, if a spouse is married to a member of the military for less than ten of the member's service years, the military will not make any payments directly to the spouse that the court handling the dissolution matter characterizes as property.[2] Also, regardless of the length of the marriage, the military will not directly provide the spouse more than fifty percent of the member's disposable retired pay.[3] Counsel explained at the October hearing that the parties were not married the required ten years and were therefore "having some documents drawn up that will allow [Monica] to get a one-half interest in [John's pension]." The master asked whether John was "agreeing for her to have one-half even though they weren't married 10 years." Counsel answered: "And he has agreed to send the other half to her . . . and . . . she is . . . going to be getting a direct payment from the military of one-half of this. . . . The other half he's just going to be sending to her bank." This discussion of the two halves reflects a potentially important aspect of the parties' intentions. The master then asked whether the $800 John agreed to pay Monica monthly was "in addition to the retirement." Monica and her lawyer confirmed that it was, until she died or remarried.

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[2] 10 U.S.C. § 1408(d)(2).

[3] *Id*. § 1408(e)(1).

At the end of the October hearing, the master found that the property division was "fair" to both parties. In November John filed an appearance and waiver asserting that he was in Korea and could not attend personally, and that he had read the petition and agreed "to all its terms relating to . . . spousal maintenance . . . , division of property (including retirement benefits) and allocation of debts." Monica's lawyer submitted a proposed order entitled "Order for Permanent Maintenance From Military Retired Pay."

In December 1993 the divorce master, after reviewing this proposed order, wrote the parties to raise two "issues." First, John, in giving Monica 100% of his retirement, exceeded the amount "require[d] or allow[ed]" under federal law. Second, the proposed order, in calling for a direct payment from the military to Monica of fifty percent of John's retirement, conflicted with the master's "understanding of the federal law that a direct payment is not possible unless the parties have been married at least 10 years."

By letter to the master, John confirmed that Monica was to receive 100% of his "net (usable) military pay," that she had been receiving that pay from him since August 1, 1993, and that a direct deposit into her bank account had "been in effect and [was] still in effect."

In February 1994 the divorce master conducted a second hearing. John attended telephonically without counsel; Monica and her lawyer attended in person. Two relevant exchanges occurred.

During the first, John agreed that Monica was "entitled" to 100% of his disposable pay and confirmed that she was receiving the pay through direct deposit and would continue to do so. But, "to clarify," he explained that as he understood it, "upon

her remarriage, . . . this retirement would stop." Monica's lawyer then stated: "we talked about that. That's our understanding also."

During the second, the master sought confirmation that the retirement benefits that Monica was getting were "in addition to the $800 a month." Counsel answered "[y]es," and John agreed. This exchange followed:

> [DIVORCE MASTER]: So you're paying spousal mai – spousal support of $800 plus a hundred percent of your disposable pay but both of those payments would stop if she remarries?
>
> [JOHN]: Correct.

Counsel then confirmed that was also Monica's understanding.

Superior Court Judge Larry D. Card, acting on the divorce master's recommendation, entered the dissolution decree in February 1994. The court's order stated that it incorporated the parties' agreements "as outlined in the petition and any amendments." The court also issued an order for "permanent maintenance from military retired pay" decreeing that Monica would recover 100% of John's "disposable retired pay as permanent and unmodifiable maintenance."

In October 1994 John wrote Monica's lawyer asking for a modification to make it clear that if Monica remarried, she would lose "all retirement pay." He stated that if the modification were not made, "I will file to pay the minimum of my retirement, if any." In apparent response to John's note, Monica's lawyer filed a November 1994 motion to amend the February 1994 permanent maintenance order to "effectuate the intent of the parties." In December 1994 Judge Card granted the motion and modified the order by adding "[i]n the event [Monica] remarries, then this Court Order, upon which payment is based, is vacated and the payments from [John's] disposable retired pay are terminated."

For the next thirteen years, Monica continued to receive 100% of John's pension payments. It is undisputed that Monica never received any monthly alimony payments of $800 in addition to the pension payments.

C. The Modification Proceedings

In June 2007 John, now represented by counsel, moved to modify Monica's alimony and pension benefit payments, asserting that there had been "substantial changes in both parties' circumstances since 1994." John contended in part that Monica's financial circumstances had "improved considerably," allowing her to purchase two homes and a restaurant business. He alleged that he, on the other hand, owned no real estate and, despite being employed, was nearly $50,000 in debt. He accordingly requested that he be released from his alimony obligation and that, after June 2007, he be entitled to collect "his share" of his military pension payments. He described "his share" as his non-marital share earned before the parties married, plus his half of the marital share. He asserted that the marital share was 40.8% of the pension, because the marriage had lasted 9.8 years and he had twenty-four years of service. His motion seemed to assume the court should divide the marital share fifty-fifty, giving Monica 20.4% of the pension and giving him the remainder.

John supported his modification motion with his affidavit and other exhibits. His affidavit stated that the dissolution had given Monica all the assets and had given him all the debts other than the mortgage, leaving her with net assets of almost $44,000 and leaving him with net liabilities exceeding $45,000. It also stated that the "$800 a month alimony payments beginning in 1993 and continuing until Monica dies or remarried" were "to be paid from my disposable military retirement pay." (Emphasis added.) It also stated that a marriage of at least ten years is required for direct payments of retired pay,

> unless the former husband . . . agrees to a voluntary allotment. I agreed to both alimony and a voluntary allotment to be paid to Monica . . . from my retired pay. Since I had agreed to alimony the court entered an order which authorized the military to pay 100% of my disposable retired pay to Monica . . . , partial alimony and partial property settlement.

It also stated that Monica had received his total retired pay, which he said was by then about $2,400 monthly. His supporting memorandum argued that he had agreed to pay monthly alimony of $800 until she died or remarried, and that "[s]he was also to receive half of [his] net monthly military pension, not simply her half of the marital or coverture share of the military pay."

He requested a hearing on his motion.

Monica opposed John's modification motion. Although she conceded that she had purchased two homes and a restaurant business since the dissolution, she argued that those assets came with "substantial" obligations, such as two mortgages that collectively exceeded $400,000. Monica stated in an accompanying affidavit that the down payment on one of the homes was paid from the $70,000 in proceeds she received when she sold the marital home. And, although her tax return stated that the take-home profit from her restaurant business was $65,203 in 2006, Monica stated in her affidavit that she had "no retirement" and "little funds in savings" and "remain[ed] dependent" on John's military retirement funds. When John took her deposition she testified that she had $30,000-$40,000 in savings.

Monica's affidavit also stated:

> It was agreed that John would pay $800 per month in spousal support until I remarried or died. It was also agreed that I would receive all allowable pay from John's disposable military retirement. John never paid the $800 a month . . .

> and I never pursued it as I could not afford counsel and I wanted our matter to be over.

Her memo argued that John's contention that the spousal support payment was to be paid from the disposable military pay was "clearly mistaken." Monica's affidavit did not explicitly confirm that contention, but permits an inference she believed she was to receive both 100% of John's retired pay and the $800.

Monica cross-moved for judgment for thirteen years of unpaid spousal support. She argued that John never sent her the $800 due each month under the agreement and that he therefore owed her $124,800.

In a new affidavit he submitted with his reply, John stated he had "agreed to let her collect alimony of $800 from my military pension and — until she remarried — she could collect all of my military retirement." Referring to an exhibit attached to his affidavit, he also stated that the military would have explained each year to Monica that one-half of the amount she was paid was "alimony." His reply memo also referred to exhibits that arguably showed that Monica's 2006 gross income actually exceeded $92,000, that she had received approximately $26,500 from John's retirement pay in 2006, and that she had reported somewhat more than half that amount ($14,058) as alimony on her 2006 tax return. His reply also argued that the parties had expected that Monica would remarry, and that it was unanticipated that she would not have remarried by 2007.

In an oral decision, Superior Court Judge Craig F. Stowers denied John's motion to modify. The court also denied John's request for a hearing because there was "no question of fact to resolve." The court held that the alimony and retirement assignment represented an integral part of the property settlement agreement and was not

subject to modification. The court found in the alternative that there was no substantial change in circumstances.

Because it also found that John was obliged to pay Monica $800 each month in addition to all of his retirement benefits, the court granted Monica's motion for judgment for unpaid alimony. Because the statute of limitations for actions on judgments was ten years,[4] the court concluded that Monica could only recover the alimony due during the ten years prior to July 3, 2007, when she cross-moved for judgment.[5] The court entered final judgment against John for $111,825.14, including $99,200 in alimony arrearages and approximately $10,600 in Alaska Civil Rule 82 attorney's fees.

John moved for a "new trial," relief from judgment, and reconsideration; the superior court denied these motions.

John appeals.

III. DISCUSSION

A. Standard of Review

The disputes here largely turn on the meaning of the parties' dissolution agreement. We apply basic contract interpretation principles to the interpretation of a

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[4] AS 09.10.040 provides that "[a] person may not bring an action upon a judgment or decree of a court . . . unless the action is commenced within 10 years."

[5] Monica does not appeal from the statute of limitations ruling, although the issue may have been governed by AS 09.35.020 rather than AS 09.10.040. AS 09.35.020 provides that the court shall grant a motion for execution of judgment filed more than five years after the entry of judgment "if the court determines that there are just and sufficient reasons for the failure to obtain the writ of execution." It, not AS 09.10.040, governs executions of judgment for alimony payments. *See Brotherton v. Brotherton*, 142 P.3d 1187, 1190 (Alaska 2006). AS 09.35.020 imposes no definitive time limitation upon motions for execution. *Id*. at 1189.

property division agreement incorporated into a dissolution decree.[6] Questions of contract interpretation generally raise questions of law that we review de novo.[7] But fact questions are created when the meaning of contract language depends on conflicting extrinsic evidence.[8] We review findings of fact for clear error.[9]

Denial of a motion to modify spousal support is reviewed for abuse of discretion.[10] We review de novo, as a matter of law, whether a party has met "her burden of demonstrating a change in circumstances so as to be entitled to an evidentiary hearing."[11] A superior court's finding as to whether there has been a material and substantial change in circumstances is reviewed for clear error.[12] The superior court ruled that John admitted that he had an affirmative obligation to give Monica $800 per month in addition to the retirement benefits. Whether a party has made binding

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[6] *Zito v. Zito*, 969 P.2d 1144, 1147 n.4 (Alaska 1998). *See also Burns v. Burns*, 157 P.3d 1037, 1039 (Alaska 2007) (applying contract interpretation principles to spousal support provision in parties' settlement agreement for divorce); *Knutson v. Knutson*, 973 P.2d 596, 600 (Alaska 1999).

[7] *See Burns*, 157 P.3d at 1039; *see also Zito*, 969 P.2d at 1147 n.4.

[8] *Norville v. Carr-Gottstein Foods Co.*, 84 P.3d 996, 1000 n.1 (Alaska 2004) (citing *Alaska Diversified Contractors, Inc. v. Lower Kuskokwim Sch. Dist.*, 778 P.2d 581, 584 (Alaska 1989)).

[9] *Hooper v. Hooper*, 188 P.3d 681, 685 (Alaska 2008).

[10] *See Hinchey v. Hinchey*, 722 P.2d 949, 951 (Alaska 1986); *see also Skvarch v. Skvarch*, 876 P.2d 1110, 1111 n.3 (Alaska 1994).

[11] *King v. Carey*, 143 P.3d 972, 973 (Alaska 2006) (custody modification).

[12] *Larson v. Larson*, 661 P.2d 626, 628 (Alaska 1983).

admissions is a question of law that we review de novo, applying our independent judgment.[13]

We independently review the denial of a request for an evidentiary hearing.[14] A requested evidentiary hearing is required if there is a genuine issue of material fact.[15]

B. Whether It Was Error To Rule that the Payment Provisions Were Non-Modifiable

Per AS 25.24.240(b) and AS 25.24.170(a), a court may modify a dissolution decree's award of alimony or spousal maintenance.[16]

Not every such award is modifiable under subsection .170(a). An alimony provision that was "an integral part of the property settlement" is not subject to later modification.[17]

The superior court concluded that the provisions awarding Monica 100% of the pension payments and alimony of $800 a month were not modifiable under

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[13] *Pugliese v. Perdue*, 988 P.2d 577, 580 (Alaska 1999) (agreeing, after reviewing counsel's statements, with trial court in holding that defense counsel's statements were not judicial admissions).

[14] *Hartley v. Hartley*, 205 P.3d 342, 346 (Alaska 2009).

[15] *See id.* (citing *Routh v. Andreassen*, 19 P.3d 593, 596 (Alaska 2001)).

[16] AS 25.24.240(b) provides: "A decree of dissolution granted under AS 25.24.200 - 25.24.260 may be modified or enlarged as prescribed by AS 25.24.150 - 25.24.170."

AS 25.24.170(a) provides that at "any time after judgment the court, upon the motion of either party, may set aside, alter, or modify so much of the judgment as may provide for alimony, . . . or for the maintenance of either party to the action."

[17] *Skvarch v. Skvarch*, 876 P.2d 1110, 1111 (Alaska 1994) (quoting *Keffer v. Keffer*, 852 P.2d 394, 397 (Alaska 1993)).

AS 25.24.170(a), in part because it concluded that these provisions were integral to the property division.

John argues that the superior court erred in its conclusions. He contends that Monica received all the assets and that he received nothing "in exchange for giving up his part-separate and part-marital military pension." He implicitly argues that these payment provisions were alimony under AS 25.24.170(a) and that they were not integral to the property settlement because he did not agree to make the payments in exchange for reduced property claims.

Monica responds that the superior court correctly determined that the alimony and retirement benefits were the product of a bargained-for exchange and were part of the property division; they therefore should not be disturbed. She acknowledges that she received all the marital assets, but contends that there was a "minimum amount of equity in the home and a large amount of debt." Although John may not have gotten any "property" in exchange for agreeing to spousal maintenance, Monica argues that he was able to "walk[] away" from a $104,365.16 home loan despite his superior earning capacity.[18]

We think it better to treat separately these three aspects of the dissolution agreement: (1) payments attributable to the marital share of John's pension; (2) payments

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[18] The court rejected John's contention that the agreement was inequitable, in part because the court observed that, taking into account the assets awarded her, Monica "came out of the deal with a net debt of $75,865." This characterization of her award seems not to recognize that Monica received a net positive award, and that the value of the house exceeded the mortgage balance.

But because the court recognized that Monica would have to service the mortgage debt, the characterization recognized that the parties might have chosen to treat all or part of the pension as part of the property settlement to make up for their earning disparity. A similar rationale also would have justified long-term alimony or support.

not attributable to the marital share; and (3) the $800 payments per Section III of the dissolution agreement. As to each aspect, the first question is whether it was "alimony" within the meaning of AS 25.24.170(a), and therefore potentially modifiable. As to any that was alimony, the next question is whether it was integral to the property division.

1. The marital portion of John's pension

John's military career lasted approximately twenty-four years and ended while the parties were still married. Their marriage lasted approximately 9.8 years. The marital portion of the pension, i.e., the part earned during the marriage, was therefore approximately 40.8% of the full pension.[19]

"[R]etirement benefits earned during the marriage are marital property subject to equitable division."[20] Monica had a property interest in the portion of the pension earned while the parties were married and John was in the military. Her share was presumptively half of the marital portion of the pension.[21] Had there been a disagreement about property division, given the differences in the parties' financial

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[19] We use "pension" here to mean the retirement plan, including the right to receive pension payments, as distinguished from the payments themselves. *See Ethelbah v. Walker*, ___ P.3d ___, 2009 WL 3789934, at *11 (Alaska Nov. 13, 2009) (stating that pension award normally includes "all the property rights associated with that benefit").

[20] *Conner v. Conner*, 68 P.3d 1232, 1235 (Alaska 2003). This principle includes military retirement benefits. *Berry v. Berry*, 978 P.2d 93, 96 n.9 (Alaska 1999) (citing *Chase v. Chase*, 662 P.2d 944, 946 (Alaska 1983)).

[21] *See Odom v. Odom*, 141 P.3d 324, 339 (Alaska 2006) (stating presumption that "equal division of marital property is most equitable") (quoting *Fortson v. Fortson*, 131 P.3d 451, 456 (Alaska 2006)).

circumstances, the dissolution court might have awarded Monica more than half, or even all, of the marital portion of the pension.[22]

The government could not directly pay Monica any part of a portion that was characterized as property because the marriage did not last ten years.[23] The parties consequently intended that at least part of the pension payments would be in lieu of a direct payment from the government to Monica. The expedient mechanism used to accomplish the payment does not alter the fact that Monica had a property interest in the marital portion of the pension.

In denying John's modification motion, the superior court treated the pension payments as integral to the property division. We think it is analytically preferable to recognize that the marital share of the pension was marital property. Payments flowing from the marital share were therefore distributions from marital property, not alimony. Black's Law Dictionary defines "alimony" as "[a] court-ordered allowance that one spouse pays to the other spouse for maintenance and support."[24] We have defined "alimony" as "periodic payments of funds for the support and maintenance of the spouse . . . . Such term does not include any payment or transfer of property or its value by an individual to his spouse."[25] The marital share of this pension was not alimony or maintenance, but property. "The provisions of a decree adjudicating property rights, unlike provisions for child support, child custody or alimony, constitute a final

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[22] *See id*. at 339 ("The division of marital property . . . is a matter of discretion for the trial court.").

[23] 10 U.S.C. § 1408(d)(2) (2006).

[24] BLACK'S LAW DICTIONARY 80 (8th ed. 2004).

[25] *Bryant v. Bryant*, 762 P.2d 1289, 1291 (Alaska 1988) (emphasis omitted) (quoting 42 U.S.C. § 662(c) (1984) (repealed 1996)).

judgment not subject to modification."[26] Likewise, AS 25.24.170(a) does not give courts authority to modify property awards.

We concur in the result reached by the superior court as to these payments, but we do so because these payments were not modifiable under AS 25.24.170(a). This makes it unnecessary to consider whether these payments were integral to the property division.

We next consider whether genuine, material factual disputes prevent us from affirming the denial of John's modification motion as to this aspect of the agreement.

John intimates that Monica should only receive half the marital portion of the pension and disputes whether any support provision was indeed integral to the property division. But he refers to no evidence permitting an inference that the marital portion of the pension was not really marital property. And he refers to no evidence that there was any dispute about whether Monica was to receive all of the marital portion of the pension. It is undisputed that John permitted the court to enter an order awarding Monica 100% of the marital share of his pension. We therefore conclude that there is no genuine factual dispute that the marital share of the pension was not modifiable under AS 25.24.170(a). As to the payments derived from the marital share, the superior court correctly denied John's modification motion. We therefore affirm the denial to the extent it addressed payment of 100% of the marital portion of the pension.[27]

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[26] *Keffer v. Keffer*, 852 P.2d 394, 396 (Alaska 1993) (quoting *Allen v. Allen*, 645 P.2d 774, 776 (Alaska 1982)).

[27] John has characterized the marital portion as 40.8% of the total. Monica has not disputed that figure, but she may have had no reason to do so to date. We have used that figure for discussion purposes; we do not intend to prevent the parties from (continued...)

2. The non-marital pension payments

We next consider whether pension payments attributable to the non-marital portion of the pension were modifiable under AS 25.24.170(a). The superior court held that none of the pension award was modifiable, reasoning that the dissolution agreement was integral to the property division.

Unlike the marital portion of the pension — which was undisputably marital property subject to division as property — the non-marital portion of the pension and the parties' treatment of that portion require us to consider whether those payments were potentially classified as alimony and if they were, whether they were nonetheless integral to the property division. Both of these issues require an examination of the parties' intent, an inquiry that was largely unnecessary for the marital portion.

The text of the dissolution agreement provides some indication that the parties considered the retirement benefits to be property, but is inconclusive. Section II.E of the agreement is titled "Assets," and the first three subsections of Section II.E are respectively titled "Real Property," "Personal Property," and "Retirement Benefits." The Retirement Benefits subsection refers to the attached addendum that addresses the military pension. The agreement's organization implies that the parties were treating the pension, at least in part, as one of the "Assets," i.e., property, to be divided. The language of the addendum is also consistent with treating the entire retirement benefit as property, although it states, somewhat ambiguously, that it "should be considered by the Court when it considers division of the marital property." Section III — titled "SPOUSAL MAINTENANCE (ALIMONY)" — provides that the $800 monthly

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[27](...continued)
litigating any genuine, material factual dispute on remand, including the percentage the marital portion is of the total pension.

payments will end upon Monica's death or remarriage, but Section II and the addendum contain no such provision.

On the one hand, superior court documents give some support to classifying the non-marital retirement payments as alimony. The form decree entered by Judge Card found that the "division of property, including retirement benefits," was fair and just, but also stated that it incorporated the parties' "agreements." Neither the agreement nor the addendum stated that retirement payments were alimony, but the 1994 enabling orders both stated that Monica would be "awarded permanent, unmodifiable maintenance in the form of one hundred percent (100%) of [John's] disposable retired pay." (Emphasis added.) "Maintenance" sounds more like alimony than property.[28] Also, the December 1994 order provides that if Monica remarries, the payments from John's "disposable retired pay are terminated" and the payment order "is vacated." This feature makes the allocation inherently less final, thus less like property and more like support.

On the other hand, the December 1994 order also provides that the maintenance was to be "permanent" and "unmodifiable," a characterization that is somewhat inconsistent with the clause that calls for vacating the order and terminating the payments if Monica remarries. In addition, John's attorney seemed to concede at argument before us that the superior court orders only characterized the payments to Monica as maintenance because that was the only way the military would make payments directly to Monica. This implies that the characterization of the payments was less important than the reality of the award.

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[28] We have used "maintenance" and "alimony" almost interchangeably. *Carr v. Carr*, 152 P.3d 450, 456 (Alaska 2007); *Fernau v. Rowdon*, 42 P.3d 1047, 1058 (Alaska 2002); *Broadribb v. Broadribb*, 956 P.2d 1222, 1227 (Alaska 1998).

One of John's arguments regarding the Section III $800 monthly payments is also relevant to how the non-marital portion of the pension award should be classified. He contends that the parties intended the $800 payments to be satisfied by the pension payments. His first affidavit asserted that the $800 monthly alimony payments were "to be paid from my disposable military retirement pay." It also asserted that he had agreed to pay Monica a "voluntary allotment" to satisfy federal requirements, and had agreed to pay both alimony and a voluntary allotment from his retired pay. His affidavit characterized the award of 100% of his retirement pay as "partial alimony and partial property settlement." This was evidence that the parties intended the Section III award, labeled "alimony" in their agreement, to be satisfied by the pension payments made under Section II. This evidence could permit an inference that the parties were using the Section III $800 provision to approximate or secure the non-marital portion of the pension. It would also permit an inference that at least $800 of each monthly non-marital retirement payment was really alimony, and thus ostensibly modifiable under subsection .170(a). This inference is also supported by these comments of Monica's counsel at the October 1993 hearing:

> THE COURT: Okay. So – but what you're getting is whatever document is necessary to divide up the re . . . . .
>
> MR. COLE: Yes, it – there's a complication in this because the two of them were not married the required 10 years under the Former Spouse Protection Act . . . . .
>
> THE COURT: Mm – hmm.
>
> MR. COLE: . . . . Services – FSPA and so we are having some documents drawn up that will allow her to get a one-half interest in it.
>
> THE COURT: He's agreeing for her to have one-half even though they weren't married 10 years?
>
> MR. COLE: And he has agreed to send the other half to her but – transfer the other half to her bank

> account and he – she is getting – going to be getting a direct payment from the military of one-half of this.
>
> THE COURT: Yeah. Okay.
>
> MR. COLE: The other half he's just going to be sending to her bank.[29]

(Emphasis added.)

Monica's tax treatment of at least part of the pension payments is also extrinsic evidence that they were in part alimony. Her 2006 income tax return reported receiving $14,508 in "alimony." Inferentially, she reported part of the pension payments as "alimony" in other years, too.

We therefore conclude that there is a genuine factual dispute whether the non-marital portion of the retirement payments was really alimony.

If the non-marital portion of the pension was indeed alimony, the next question is whether it was integral to the property division. The superior court concluded that there was "no indication whatsoever that the parties' settlement agreement [was] anything other than an integrated property settlement agreement."

An alimony provision that is "an integral part of the property settlement" is not subject to later modification.[30] When we first adopted this approach in *Keffer v. Keffer*,[31] we cited and quoted from an American Law Reports annotation that stated:

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[29] At the October 1993 hearing Monica's counsel continued on to confirm that the "$800 a month that [John] agreed to pay" was "in addition to the retirement." Whether receipt of the non-marital portion of the pension payments was meant to satisfy the $800 monthly obligation is discussed in Part III.D below.

[30] *Skvarch v. Skvarch*, 876 P.2d 1110, 1111 (Alaska 1994) (quoting *Keffer v. Keffer*, 852 P.2d 394, 397 (Alaska 1993)).

[31] *Keffer v. Keffer*, 852 P.2d 394, 397 (Alaska 1993).

> where an agreement's provisions for support are an integral and inseparable part of the property settlement, as where the payments are in consideration for a transfer of property, a decree based on that agreement cannot be modified with respect to support. Conversely, if the provisions for support and for the settlement of property rights are clearly separable, though contained in one instrument, the court has the power to modify the support provisions of the decree even though it cannot alter the settlement of property rights.[32]

Alimony payments are integral to the property settlement if they "constitute part of the consideration given for other property benefits."[33] In *Keffer*, a husband agreed to pay his wife $540 twice monthly in permanent spousal support.[34] We held that this provision was integrated because it was agreed upon in exchange for the recipient spouse's relinquishment of her husband's retirement.[35]

We similarly held in *Skvarch v. Skvarch* that an agreement to pay thirty-six months of rehabilitative alimony payments was integral to the property division.[36] In arriving at that conclusion we noted:

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[32] John J. Michalik, Annotation, *Divorce: Power of Court to Modify Decree for Alimony or Support of Spouse Which Was Based on Agreement of Parties*, 61 A.L.R.3D 520, 590 (1975), *quoted in Skvarch*, 876 P.2d at 1111, and *Keffer*, 852 P.2d at 397.

[33] *Skvarch*, 876 P.2d at 1112 (citing *Keffer*, 852 P.2d at 399 (Rabinowitz, J., dissenting) ("Integration . . . is grounded on the theory that spousal support was, at least in part, negotiated as a 'trade off' for [other property benefits].")).

[34] *Keffer*, 852 P.2d at 395-96.

[35] *Id*. at 397.

[36] *Skvarch v. Skvarch*, 876 P.2d 1110, 1114 (Alaska 1994).

(1) the agreement treated the alimony provision the same as "other asset" provisions;

(2) the alimony payments were accounted for in the property division totals;

(3) excluding the alimony payments would have resulted in an arguably inequitable property division;

(4) the agreement did not explicitly link the alimony payments to the recipient spouse's rehabilitation efforts or explicitly provide that the payments were subject to subsequent modification;

(5) the parties negotiated the principal amount of alimony and its effect on the property settlement;

(6) there were particular circumstantial reasons for using "alimony-type payments" to adjust the property settlement; and

(7) there was no apparent justification for the donor spouse to believe when negotiating the agreement that the monthly payments were needed for rehabilitation.[37]

The considerations discussed in *Skvarch* are not necessarily exhaustive, but they do not demonstrate that, as a matter of law, the award of the non-marital portion of John's pension was integral to the property division:

(1) Because the agreement treated the $800 payments as alimony separate from the property division, if the non-marital part of the pension was in fact alimony, it was arguably not integral.

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[37] *Id*. at 1112-13.

(2) The property division totals did not account for the non-marital retirement payments; there was no indication the parties put a present value on any part of the benefits.

(3) There was no direct evidence that John and Monica used the non-marital portion of the pension to remedy an inequitable property division. It is arguable, but not obvious, that excluding the non-marital retirement payments might have resulted in an inequitable property division. A less generous award to Monica would not have been inequitable as a matter of law, even though she received the mortgage debt.

(4) The agreement did not link the non-marital retirement payments to rehabilitation and did not state that payments could be modified upon a change of circumstances. But the enabling orders contemplated ending all payments, including the pension payments, if Monica remarried.

(5) There was no evidence that the parties negotiated the payment amounts and their effect on the property settlement. There was no contemporaneous evidence that there was a bargained-for exchange in this regard, and Monica's 2007 affidavit and deposition provided no direct evidence that the parties negotiated the amount in light of the property division. Monica's affidavit did not discuss any negotiations implying integration. She offered no affidavit from her former lawyer and did not take John's deposition to establish a course of negotiations.

(6) There were circumstantial reasons — the restrictions in federal law — for using "alimony-type payments" to accomplish, at least in part, a property settlement.

(7) John might well have anticipated that the monthly payments were needed so Monica could stay in the marital home, but there was no indication the non-marital retirement payments were needed for rehabilitation.

In short, there was no affirmative evidence that the non-marital portion was integral to the property division, and there was some evidence, contained in John's affidavit, permitting an inference that it was not. The *Skvarch* considerations are inconclusive; some imply integration and others imply non-integration.

John asked for a hearing. The superior court denied that request. The request did not specifically ask for an opportunity to present evidence, but the accompanying memorandum indicated a hearing was requested "because [John] expect[ed] to take" Monica's deposition "to supplement the record as to her financial information and status."

Extrinsic evidence about the course of negotiations and the parties' contracting intentions would have been relevant to two material questions: whether the award of payments derived from the non-marital portion was alimony and whether it was integral to the property division.[38] There were genuine factual disputes as to both those questions.

We therefore vacate the denial of John's motion to the extent it concerned payments attributable to the non-marital portion of the pension. On remand, the court

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[38] In litigation concerning the parties' understanding of a contract, a party may testify about its " 'understanding in objective terms . . . sufficiently detailed to enable [trier of fact] to form its own judgment as to the reasonableness of [the party's understanding] and the likelihood that [the other party] would have the same understanding.' " *In re Estate of Fields*, 219 P.3d 995, 1012 n.57 (Alaska 2009) (quoting *Alaska Tae Woong Venture, Inc. v. Westward Seafoods, Inc.*, 963 P.2d 1055, 1067 (Alaska 1998)) (alterations in original). Testimony regarding the parties' conduct after entering into the contract from "persons with first-hand knowledge of party intent and conduct" can be "probative of the intent behind the agreement." *Municipality of Anchorage v. Gentile*, 922 P.2d 248, 259 (Alaska 1996). "[L]itigation affidavits of a party concerning the party's intent which are supported by references to relevant extrinsic evidence" are probative. *Scully v. Scully*, 987 P.2d 743, 748 & n.21 (Alaska 1999).

must determine whether those payments were alimony. If they were, it must determine whether they were integral to the property division. Those determinations will in turn determine whether it must consider John's claim of changed circumstances.

3. The monthly $800 payments

We next consider whether the $800 payment provision was modifiable under AS 25.24.170(a). We recognize that the parties disagree about whether this provision entitled Monica to receive monthly $800 payments in addition to 100% of John's retirement, an issue we discuss in Part III.D below. Because it is unclear how that issue will ultimately be resolved, it is necessary to address the modifiability of the $800 payment provision.

We begin by confirming that the monthly $800 payments were alimony. Section III of the dissolution agreement labeled these payments "maintenance" or "alimony." There was no credible evidence, and Monica does not argue, that the $800 payments were not alimony.

We next consider the integration issue. The superior court concluded that the $800 payments were integral to the property settlement (and therefore unmodifiable), both because they were part of a complete property settlement and because there was "no indication whatsoever that the parties' settlement agreement [was] anything other than an integrated property settlement agreement." The superior court made no factual findings that the $800 provision was the result of a bargained-for exchange, and made no factual findings regarding the other considerations discussed in *Skvarch*.

We have never held that simply including a support provision in the same document as the property settlement creates a kind of "integration presumption" that the party seeking modification must overcome. In our cases in which a support provision was integral to the property division, there was factual support for the conclusion that

spousal maintenance was part of a bargained-for exchange.[39] Those cases did not suggest that the mere absence of contrary evidence would be sufficient. There was no direct evidence of integration.

And the *Skvarch* considerations do not establish that, as a matter of law, the $800 payment provision was integral to the property division. A few considerations weigh in favor of finding integration and others weigh against it.

(1) The agreement in substance and organization did not treat alimony the same as property.

(2) The property totals did not account for any alimony payments.

(3) If they were in addition to 100% of the pension, it could not be said that excluding the $800 alimony payments would have created an inherently inequitable property division, even considering the disparity in the parties' earning capacities.[40] Because the amount of the marital portion of the pension payments was substantial relative to the parties' marital property and the debt on the house, the $800 payments (even if they were part of the retirement payments) were inferentially not needed to balance the property division.

(4) The dissolution agreement did not expressly state that the alimony payments would be modifiable if Monica remained unmarried,[41] and they were not expressly linked to the usual purposes (rehabilitation or reorientation) of alimony. The agreement specified two grounds for ending the payments without expressly stating that

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[39] *See, e.g.*, *Skvarch*, 876 P.2d at 1111-14.

[40] The parties do not agree upon the net value of the awards of marital property, and our calculations differ somewhat from the parties'; the differences are not material.

[41] *Skvarch*, 876 P.2d at 1112-13.

other circumstances would not or might justify modification. That the parties agreed that the $800 payments would end upon death or remarriage implies some lack of finality. The parties' treatment of these payments as modifiable weighs against treating them as part of the property settlement.

(5) There was no evidence that the parties negotiated the alimony in settling property. Monica did not relinquish claims to other property in exchange for the $800 payments, and indeed, there was no other marital property in addition to that awarded to her. There was no evidence of a bargained-for exchange beyond the assertions in Monica's 2007 unsworn memorandum that she had agreed to assume the mortgage debt in exchange for monthly support payments.[42] Monica's accompanying affidavit contained no such assertion. But even the unsworn contention did not address the $800 alimony payments.

(6) The circumstantial reasons for using the pension payments to adjust the property settlement do not seem to apply to the $800 alimony provision.

(7) The agreement did not limit alimony to rehabilitative purposes; because remarriage required termination the parties may have anticipated a favorable change of circumstances.

On balance, the *Skvarch* factors militate against finding that the $800 alimony payments were integral to the property division. We accordingly hold that it

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[42] "Differences of opinion among the parties as to their subjective intent, expressed during the litigation, do not establish an issue of fact regarding the parties' reasonable expectations at the time they entered into the contract, since such self-serving statements are not considered to be probative." *Keffer v. Keffer*, 852 P.2d 394, 398 (Alaska 1993). But if Monica's 2007 memorandum was accurately describing the purpose of the payments, the apparent post-dissolution discharge of the mortgage debt on the marital house implies that this purpose would no longer justify continuation of the payments.

was error to decide, without the benefit of an evidentiary hearing, that the Section III monthly support payments were unmodifiable. We vacate that ruling and remand for further proceedings.

C. Whether It Was Error To Hold that There Had Been No Substantial Change in Circumstances

The superior court alternatively concluded that, even if the alimony and retirement benefits were subject to modification, John had not demonstrated that Monica's improved financial situation was a substantial change in circumstances. The court instead found that John had admitted that Monica's financial improvement was "anticipated" when he stated in his reply memorandum that "the parties expected that Monica . . . would both improve her earning capacity and remarry within a few years after the dissolution." The court concluded that Monica's financial improvement was not a substantial change in circumstances because it was "expected."

John argues that the court's conclusion was incorrect. Although he concedes that he had "hoped" Monica's income would improve, he argues that he never expected she would do as well as she has. He questions whether any increase, no matter how great, in Monica's economic situation could be said to have been anticipated just because some improvement was expected.

Monica responds that there has been no substantial change in circumstances. She argues that alimony awards should be strictly construed and should not be subject to modification just because the recipient spouse has "changed her financial picture from her own efforts." Monica also argues that to modify the agreement now, after she has retired over $100,000 of the marital debt, would permit John to avoid his contractual obligations after receiving the benefit of his bargain.

Although AS 25.24.170(a) provides that alimony payments may be modified any time after judgment, we have stated that a "material and substantial change in circumstances is generally required in order to modify a provision of a decree calling for spousal . . . support."[43] "[A]n unanticipated permanent change in the financial abilities of the parties may be an adequate basis for finding a material and substantial change of circumstances sufficient to warrant modification of a spousal support decree."[44] In determining whether a change in circumstances justifies a reduction, courts should first consider the needs and financial abilities of both parties and determine whether the equities justify placing a greater burden on one former spouse and a correspondingly lesser burden on the other.[45] The same standard applies to a support decree based on a separation agreement or stipulation signed by the parties.[46]

The superior court concluded that there was "no question" that, since the date of dissolution, Monica's financial situation had improved "to a certain extent." The court did not analyze whether the needs and financial abilities of both parties justified continuing to place a substantially greater burden on John and a correspondingly lesser burden on Monica. Because it found that both parties anticipated Monica's financial improvement, the court likely concluded that further analysis was unnecessary.

But Monica is now the proprietor of a business with an annual net profit exceeding $65,000, and she has effectively tripled her income since the dissolution,

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[43] *Hinchey v. Hinchey*, 722 P.2d 949, 951 (Alaska 1986) (citing *Larson v. Larson*, 661 P.2d 626, 628 (Alaska 1983); *Curley v. Curley*, 588 P.2d 289, 291 (Alaska 1979)).

[44] *Id.* at 952.

[45] *Id.* (quoting *Curley*, 588 P.2d at 292).

[46] *Curley*, 588 P.2d at 292.

when her wages barely exceeded $19,000. John's superior court reply memo admitted that he had expected Monica to "improve her earning capacity," but he never admitted, and there was no evidence, that he had expected that her earning capacity would improve to such an extent.[47]

We conclude that John did not admit that he expected Monica's earning capacity would improve so significantly; we also conclude that the evidence presented cannot support a finding that the parties anticipated Monica's current financial condition. We accordingly remand the question of change of circumstances for further proceedings regarding the current financial situations of the parties.

D. Whether It Was Error To Grant Monica's Cross-Motion for Past Due Alimony

The superior court granted in part Monica's cross-motion for judgment on unpaid alimony after concluding that John had not satisfied his obligation to pay her alimony of $800 each month. The court rejected John's contention that the $800 payments were to be deducted from the retirement payments as both unpersuasive and lacking in evidentiary support. Based on the text of the parties' agreement and John's testimony at the dissolution hearing about his understanding of that agreement, the court found that John had "an affirmative obligation to pay [Monica] $800 a month" in addition to 100% of his retirement pay. The court also found that John had admitted in a 2007 memorandum that he had an affirmative obligation to pay.

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[47] Furthermore, to the extent any part of the retirement payments (notably 100% of the marital share of the payments) was part of the property division, it must be added to Monica's own earnings. If it indeed equals 40.8% of the benefits, approximately $10,000 annually should be added to the $65,000 figure to determine whether any unintegrated support award should be modified.

John now argues that the superior court erred in "failing to consider" that his monthly spousal support payment obligations were satisfied by his retirement payments. John contends that the court erroneously found that John had admitted that he was obliged to pay Monica $800 each month. John contends that he agreed to give Monica fifty percent of his disposable retirement pay plus $800 in alimony to be paid from the rest of his disposable retirement pay.[48]

Monica responds that John's argument does not comport with the text of the agreement or John's representations during the dissolution hearing.

We consider first whether John made a binding judicial admission that he had an obligation to affirmatively pay Monica $800 each month in spousal support, over and above the full amount of the retirement benefits.

A voluntary concession of fact made by a party or a party's attorney during judicial proceedings is a judicial admission.[49] It is a "formal waiver of proof that relieves an opposing party from having to prove the admitted fact and bars the party who made the admission from disputing it."[50] To qualify as a judicial admission, a party's statement must be "a clear, deliberate, and unequivocal statement of fact."[51]

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[48] John does not argue that we should retroactively modify the spousal support award to reduce his accrued obligations. Although there appears to be no statutory prohibition against retroactive modification of alimony, we note that the majority rule is that spousal support may not be retroactively modified. *See* 24A AM. JUR. 2D *Divorce and Separation* § 754 (2008) (restating general rule that "no retroactive modification can be made to reduce accrued obligations owed for alimony").

[49] 29A AM. JUR. 2D *Evidence* § 783 (2008).

[50] BLACK'S LAW DICTIONARY 51 (8th ed. 2004).

[51] *Crosby v. Hummell*, 63 P.3d 1022, 1027-28 (Alaska 2003). To be binding, (continued...)

The superior court concluded that John admitted that he had an affirmative obligation to pay when John observed in a memorandum that he had "agreed to make $800 a month alimony payments beginning in 1993 and continuing until Monica . . . died or remarried." (Emphasis added.) The court considered this to be an admission that John had agreed not to "deduct" the $800 payments from his disposable retirement payments each month, but had agreed "actually to make" the $800 payments until Monica died or remarried. Any statement that requires us to parse words to this degree is not sufficiently clear, deliberate, and unequivocal to be a binding admission.

We next consider whether John had an affirmative obligation to pay Monica an additional $800 in spousal support monthly. This inquiry involves a question of contract interpretation. A court's objective when interpreting any contract is determining and enforcing the parties' reasonable expectations.[52] "The parties' expectations are assessed by examining the language used in the contract, case law interpreting similar language, and relevant extrinsic evidence, including the subsequent conduct of the parties."[53]

The dissolution agreement never explicitly states that Monica was to receive monthly alimony payments of $800 in addition to 100% of John's disposable

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[51](...continued)
the admission cannot be "a conclusion of law or an expression of opinion." *Hayes v. Xerox Corp.*, 718 P.2d 929, 931 (Alaska 1986). Judicial admissions are not evidence, "but rather have the effect of withdrawing a fact from contention." *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 341 (Alaska 2005) (quoting 30B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 7026 (2004)).

[52] *Norville v. Carr-Gottstein Foods Co.*, 84 P.3d 996, 1004 (Alaska 2004).

[53] *Id.* (citing *Municipality of Anchorage v. Gentile*, 922 P.2d 248, 256 (Alaska 1996)).

retirement benefits. At the 1994 dissolution hearing, the divorce master questioned John about his understanding of his future obligation to Monica. John's answer indicated that he understood the agreement as requiring him to pay spousal support of $800 plus 100% of his disposable retirement benefits. This testimony is evidence that supports an inference that John agreed to pay Monica $800 each month in addition to all of his retirement benefits.

But there is also substantial extrinsic evidence permitting a contrary inference. First, Monica's 2006 tax return reported that she had received $14,508 in "alimony." This characterization of the military retirement payments is potentially consistent with concluding that Monica regarded the $800 alimony payments as part of, and not in addition to, the retirement payments.

Most importantly, Monica first attempted to collect the alleged arrearages on the spousal support obligation thirteen years after the parties' petition was incorporated into the court's final decree of dissolution. During that thirteen-year period, Monica had ample incentive and opportunity to object to any alleged deficiencies in John's performance. She never did. If there was in fact an additional obligation, the deficiency was substantial, totaling $9,600 annually. Monica testified at her deposition that she never asked John why he was not sending her those payments, except perhaps once around the time of the dissolution. According to her affidavit, Monica did not pursue the unpaid alimony because she "could not afford counsel" and "wanted [the] matter to be over." This factual question would benefit from development at an evidentiary hearing.

Extrinsic evidence of the course of performance can aid in interpreting a contract's meaning. Section 202 of the Restatement (Second) of Contracts, which we

favorably cited in *Estate of Polushkin ex rel. Polushkin v. Maw*,[54] states that "[w]here an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement."[55] Comment g to section 202 explains the rationale for course-of-performance evidence and states:

> The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. But such "practical construction" is not conclusive of meaning. Conduct must be weighed in the light of the terms of the agreement and their possible meanings. Where it is unreasonable to interpret the contract in accordance with the course of performance, the conduct of the parties may be evidence of an agreed modification or of a waiver by one party. Or there may be simply a mistake which should be corrected.[56]

The court denied John's modification motion without conducting an evidentiary hearing. The superior court never addressed Monica's seeming acquiescence in John's course of performance for more than thirteen years or the impact it should have on how to interpret John's contractual obligations. It was error not to consider this and other extrinsic evidence. Because there is a genuine, material factual dispute about what the parties intended, we vacate the decision to grant Monica's cross-motion for judgment on past due alimony and remand for further proceedings.

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[54] *Estate of Polushkin ex rel. Polushkin v. Maw*, 170 P.3d 162, 170-71 (Alaska 2007).

[55] RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (1981) (emphasis added).

[56] *Id*. cmt. g (internal citation omitted).

IV. CONCLUSION

For the reasons discussed above, we AFFIRM the denial of John's modification motion as to payments attributable to the marital portion, but we VACATE the denial of John's motion as to the payments not attributable to the marital portion of the pension and as to the $800 payment provision. We also VACATE the decision to grant Monica's cross-motion for unpaid alimony. We REMAND for further proceedings consistent with this opinion. Because Monica is no longer the prevailing party, we VACATE her award of attorney's fees.